Public Prosecutor v Mohamed Yusni bin Mohamad Nor & Anor

HIGH COURT (PULAU PINANG) — CRIMINAL TRIAL NO 45–32 OF 1999
KAMALANATHAN RATNAM J
23 OCTOBER 2004

Criminal Procedure — Trial — Cautioned statement — Cautioned statements of both accused persons consistent — Cautioned statements consistent with evidence under oath — Whether accused persons were transporting drugs

Criminal Procedure — Trial — Voluntariness of statement — Cautioned statement — Excessive force used prior to statement made — Whether voluntarily made — Whether admissible — Dangerous Drugs Act 1952 s 39B(1)(a)

Evidence — Statement — Cautioned statement — Excessive force used prior to cautioned statement being made — Whether voluntarily made — Whether admissible

The accused persons were charged with trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution alleged that the accused persons were carrying the drugs in between them whilst riding a motorcycle. However the accused persons, both in their cautioned statements and under oath, maintained that the drugs were in fact hidden in the bushes. The cautioned statements were recorded at the scene. The court ordered a trial within a trial to determine the voluntariness of the cautioned statement. During the trial within a trial, SP8, Inspector Zulhazi, admitted that the accused persons were assaulted by the police and the police had used more force than was necessary on both accused persons prior to the recording of the cautioned statements.

Held, acquitting the accused persons:

(1) There was a doubt as to the voluntariness of the cautioned statement. Based on the facts there would have been some element of fear on the part of the accused persons. As such the caution statement of the second accused was inadmissible (see para 8).

(2) A perusal of both the cautioned statements showed that both the accused were not carrying the offending exhibits with them on the motorcycle at the time of the ambush. There was however evidence that the offending exhibits were recovered by the police some distance from where the accused persons were arrested. *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 states that the court could rely on the cautioned statement to acquit. The defence had already put its case through the prosecution's witnesses that the offending drugs were hidden in the bushes and that the police actually lay in wait in ambush for the accused persons. Since that was the only issue of substance raised by the defence, upon a maximum evaluation of the available evidence, the prosecution had made out a *prima facie* case against both the accused (see paras 15 and 16).

(3) The evidence given by both accused persons under oath and their cautioned statements were consistent. Having heard the evidence of

both the accused there was a doubt as to whether the white plastic bag with the drugs in it was actually being carried in between both the accused on the motorcycle. This was based upon both their cautioned statements, wherein no mention had been made that they were transporting the drugs on the motorcycle. The two accused persons were merely to act as transporters. They were to be paid for collecting the drugs from the hiding place in the bushes and transporting the drugs. Before both the accused could collect the drugs from the bushes, the police apprehended them (see paras 19, 20 and 23).

[**Bahasa Malaysia summary**

Tertuduh-tertuduh disabit dengan kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Pihak pendakwa mengadu bahawa tertuduh membawa dadah tersebut di antara mereka semasa menunggang sebuah motosikal. Akan tetapi, tertuduh di dalam pernyataan beramaran mereka dan di bawah sumpah, mengatakan bahawa dadah tersebut sebenarnya tersorok di dalam semak. Pernyataan beramaran itu direkodkan di tempat kejadian. Mahkamah telah memerintahkan satu perbicaraan di dalam perbicaraan untuk menentukan kesukarelaan pernyataan beramaran itu. Semasa perbicaraan di dalam perbicaraan, SP8, Inspektor Zulhazi, mengaku bahawa tertuduh telah diserang oleh polis dan pihak polis juga telah menggunakan kekerasan yang lebih daripada yang sepatutnya ke atas kedua-dua tertuduh sebelum merekodkan pernyataan beramaran dari mereka.

Diputuskan, membebaskan tertuduh-tertuduh:

(1) Terdapat keraguan berkaitan kesukarelaan pernyataan beramaran itu. Berdasarkan fakta-fakta semestinya terdapat elemen kesangsian pada tertuduh. Oleh itu, pernyataan beramaran tertuduh kedua tidak dapat diterima sebagai keterangan (lihat perenggan 8).

(2) Penelitian kedua-dua pernyataan beramaran menunjukkan kedua-tertuduh tidak membawa eksibit-eksibit yang salah di atas motosikal semasa serang hendap itu. Walau bagaimanapun, terdapat keterangan bahawa eksibit yang salah telah dijumpai oleh pihak polis di tempat di mana tertuduh ditangkap. *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 menyatakan bahawa mahkamah boleh bergantung kepada pernyataan beramaran untuk membebaskan tertuduh. Pihak pembelaan telah mengasaskan kes mereka melalui saksi-saksi pihak pendakwaan bahawa dadah itu tersorok di dalam semak dan polis telah menyerang hendap tertuduh. Memandangkan itu merupakan satu-satunya isu kukuh yang dibangkitkan oleh pihak pembelaan, pada taksiran maksimum keterangan yang tersedia ada, pihak pendakwaan telah membuktikan kes prima facie terhadap kedua-dua tertuduh (lihat perenggan 15 dan 16).

(3) Keterangan yang diberikan oleh kedua-dua tertuduh di bawah sumpah dan di dalam pernyataan beramaran mereka adalah konsisten. Setelah mendengar keterangan kedua-dua tertuduh terdapat keraguan sama ada beg plastik putih yang mengandungi dadah telah dibawa di antara

kedua-dua tertuduh di atas motosikal. Ini berdasarkan pernyataan-pernyataan beramaran di mana tiada dikatakan bahawa kedua-dua tertuduh membawa dadah di motosikal. Kedua tertuduh hanya menjadi pengangkut. Mereka akan dibayar untuk mengambil dadah daripada tempat ia disorok di semak dan untuk mengangkut dadah itu. Sebelum kedua tertuduh itu dapat mengambil dadah daripada semak itu, polis telah menangkap mereka (lihat perenggan 19, 20 dan 23).]

Notes

For cases on voluntariness of statement in a trial, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4309–4317.
For cases on cautioned statements in trial, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3866–3893.
For cases cautioned statements, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2273–2285.
For admission of statements in evidence, see 18 *Halsbury's Laws of Malaysia*, para [310.129].

Cases referred to

Alcontara a/l Ambross Anthony v Public Prosecutor [1996] 1 MLJ 209 (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (refd)
Public Prosecutor v Lin Lian Chen [1992] 2 MLJ 561 (folld)

Legislation referred to

Dangerous Drugs Act 1952 s 2, 39B(1)(a)

Tuan Hazril bin Harun DPP for the prosecution
RSN Rayer (R Nethaji Rayer & Co) for the first accused
K Saravanakumar (Jega Kumar & Co) for the second accused

Kamalanathan Ratnam J:

The Charge

[1] Both the accused faced the following charge:

'Bahawa kamu secara bersama pada 18 September 1998, jam lebih kurang 9 malam, di Jalan Permatang Tok Gelam, Telok Air Tawar, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya, iaitu cannabis seberat 4748 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(l)(a) Akta Dadah Berbahaya 1952 (semakan 1980), dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama'

The Evidence

[2] The first witness for the prosecution was the Government Chemist. He confirmed receiving a package from Chief Inspector Zailani ('SP10'). He found five plastic packets filled with compressed plant material weighing

a total of 4,748g which on analysis he found to be cannabis as defined in s 2 of the Dangerous Drugs Act 1952 ('the Act'). The officer from the Registrar and Inspector of Motor Vehicles ('the RIMV') testified that from his records, motorcycle PDJ 8061 in which both the accused were riding at the material time belonged to the second accused. SP4, one of the raiding officers testified that on 18 September 1998 after a briefing by Inspector Zulhazi ('SP8') he and Sergeant Khozen were stationed along the main road Jalan Permatang Tok Gelam adjourning a side road leading to an abandoned building. Inspector Zulhazi with the rest of the members of the raiding party had positioned themselves along this side road and some were at the abandoned building. He was instructed to inform Inspector Zulhazi over the walkie-talkie the moment the suspects, who were later identified as both the accused persons, entered the side road. After nearly an hour's wait he noticed two persons riding motorcycle PDJ 8061 and the same motorcycle entered the side road. He then informed Inspector Zulhazi of their presence. When the two accused entered the side road he noticed a white plastic bag in between the rider and the pillion. He identified the said white plastic bag that was seized at the scene and which was tendered in court. After about 3 to 4 minutes he heard the shout 'Polis'. He and Sergeant Khozen then rushed into the side road when he noticed that both the accused persons had been arrested by then. He then identified both the accused persons as the rider and the pillion. He then saw Inspector Zulhazi opening the white plastic bag and from inside it he took out five plastic packets filled with ganja.

[3] Under cross-examination he maintained that the place was bright that night as it was well lit up by the moon and besides the place was a vast vacant piece of land. He and Sergeant Khozen hid beside a drain whilst laying in ambush and when the motorcycle passed them by, the motorcycle was about 8 to 10m from them. He denied the defence suggestion that the plastic bag was not in between the two motorcyclists. He also denied the defence's suggestion that he only saw the plastic bag after it was recovered from amongst the bushes in that area. He also denied the suggestion that both the accused persons were smeared with mud and blood after they had fallen into the mud and after they had been assaulted.

[4] The next witness of importance was SP8, Chief Inspector Zulhazi who headed the raiding party. He testified that on the material date at about 8pm he led a party of policemen to an area near a padi field along Jalan Permatang Tok Gelam. He divided his officers into three groups. One group was stationed at the entrance to the side road with a walkie-talkie, another group was stationed at the abandoned building and the third group was stationed midway to the abandoned building.

[5] At about 9pm he received information from the group at the entrance that a motorcycle with two persons and with a plastic bag in between them was entering the side road. As soon as the said motorcycle stopped along the side road after proceeding about 10 to 15m, the entire team rushed towards the motorcyclists. Both the accused persons attempted to escape when he shouted 'Polis'. As the motorcycle fell, both the accused persons ran. He saw the plastic bag fall to the ground. After a short struggle his team was able to

detain both the accused persons. He identified the two as both the accused persons present in court. He examined the contents of the white plastic bag. Inside it were five plastic packets containing compressed ganja. He then read the statutory caution to both the accused and then recorded their cautioned statement. At the request of both counsel, I ordered a trial within a trial to determine the voluntariness of the cautioned statement.

Trial Within a Trial

[6] The first witness was Chief Inspector Mohd Zulhazi. He confirmed that on 18 September 1998 at about 9.45pm he recorded a cautioned statement from the second accused, the pillion rider of the said motorcycle. Since the accused was a Malay, he read the caution in Bahasa Malaysia and explained the contents and the meaning to the accused. The accused nodded his head indicating that he understood the explanation. After the recording the accused signed it and also jotted down his identity card number. He then signed below the accused's signature. He did not at any time put any pressure or use any force or threat or induce the accused to make the statement. After recording he read back the entire statement and the accused indicated that he did not wish to amend any part of his statement.

[7] Under cross-examination he confirmed that the cautioned statement was recorded at the scene itself. He admitted that during the struggle the police personnel had assaulted both the accused. After the arrest, he noticed blood at the back of the second accused's head where there was an injury. He also confirmed that both the accused persons were smeared with mud from the padi field. He also admitted that on that day the police used more force on both the accused than was necessary. He also admitted that there was an open wound at the back of the second accused's head and that he was bleeding.

[8] Having heard submissions I ruled that based on the admission of Chief Inspector Zulhazi that excessive force was used against both the accused prior to the recording of the cautioned statement of the second accused, there was a doubt in my mind as to the voluntariness of the cautioned statement. Surely there would have been the element of fear. On this ground I ruled the cautioned statement inadmissible. The learned deputy then informed the court that he was not proceeding to admit the first accused's cautioned statement. I then resumed with the main trial.

[9] SP8 then continued with his evidence. He testified that he brought both the accused together with the exhibits back to the police station where he lodged a police report. Later he handed over the exhibits and the accused to the investigating officer.

[10] During cross-examination SP8 was asked if he had heard of one Azizan and he replied in the negative. He denied the suggestion that it was this Azizan who asked both the accused to go to this side road and that as soon as both the accused had entered the said side road Azizan left the scene. He also denied the suggestion that the white plastic bag containing the ganja was actually found from amongst the bushes.

[11] The next witness SP9 was also a member of the raiding party who was stationed at the abandoned building. Before he could reach his station he noticed the accused dropping the motorcycle and running away towards the padi field. He then reached the fallen motorcycle and saw the white plastic bag beside it. Shortly thereafter both the accused were arrested. He then saw Chief Inspector Zulhazi open the white plastic bag and inside it were five plastic packets of compressed ganja. SP10 Chief Inspector Zailani confirmed receiving the exhibits and the accused from SP8.

[12] Under cross-examination the witness admitted that he recorded the cautioned statement from the first accused. Counsel then asked that the said cautioned statement be tendered as his client's exhibit. SP10 denied the defence's suggestion that the police had used one Azizan to effect the arrest of both the accused. The cautioned statement of the second accused was also admitted into evidence and marked as an exhibit. In that statement the second accused had admitted that one Rahim had hid the plastic bag of ganja in the bushes. Under re-examination the learned deputy elicited from the second accused's cautioned statement the words:

> 'Saya mengajak Izani menghantar barang ganja yang dibawa oleh Rahim yang mana barang tersebut telah berada di Jalan Pekan Darat dekat benteng untuk diberi kepada Azizan.'

[13] With this last witness, the prosecution closed its case.

Findings of the Court

[14] It is of course trite law that an accused is entitled to use his own cautioned statement for his own vindication just as the prosecution would want to use it for the accused's conviction.

[15] A perusal of both the cautioned statements show that both the accused were not carrying the offending exhibits with them on the motorcycle at the time of the ambush. There is however evidence that the offending exhibits were recovered by the police some distance from where the accused persons were arrested. The defence relied on *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 to show that the court could rely on the cautioned statement to acquit. Further the defence had already put its case through the prosecution's witnesses that the offending drugs were in fact hidden in the bushes and that the police was actually laying in wait in ambush for the accused. The learned deputy however referred this court to the case of *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 where the Federal Court held at p 576 that:

> A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And in considering whether there is a case to answer, the trial judge ought not to take into account such a statement as the basis for founding an order of acquittal and discharge. *PP v Adetunji Adeleye Sule* [1993] 2 MLJ 70 (SC) was a case involving presumption under s 37(1)(d) and (da) of the Act by reason of the accused being in manual possession of the trunk in which heroin was found. The (then) Supreme Court set aside the order of discharge and acquittal

made by the trial judge at the end of the case for the prosecution. Delivering the judgment of the court, Edgar Joseph Jr SCJ (now FCJ) — after expressing that the conduct and demeanour of an accused should not by themselves be sufficient to rebut a statutory presumption that had arisen against the accused — said (at p 74):

> In the same way, in a case where the onus lies on an accused to rebut a statutory presumption, a voluntary out of court statement by the accused — and this would include a cautioned statement — which is wholly exculpatory should not be made the foundation of an order or acquittal especially at the close of the case for the prosecution, since, at that stage, the accused not having given evidence himself, his explanation could not be tested by cross-examination.

[16] Since that was the only issue of substance raised by the defence, I found upon a maximum evaluation of the available evidence that the prosecution had made out a *prima facie* case against both the accused and called upon them to enter into their defence.

[17] The first accused gave his evidence under oath. He denied that on the day and time in question he was transporting the offending drugs. He affirmed that the offending drugs were found by the police amongst the bushes. When he was arrested he was assaulted by the police into admitting that he was carrying the drugs. Referring to his cautioned statement he maintained that one Azizan told him to go to the place where he was arrested. Under cross-examination by the learned deputy he was unable to give the full name and address of this Azizan. He had met this Azizan at the main road, Jalan Permatang Tok Gelam at about 9pm.

[18] The second accused also testified under oath. He denied that when he gave a lift to the first accused the first accused had in his possession the plastic bag. He also denied it was his. He too confirmed that the plastic bag containing the drugs were found in the bushes by the police. When asked why he went to the scene he said that since the first accused did not have transport he had asked him to give him a lift to that place to meet with Azizan. He did not know why the first accused wanted to meet with Azizan. He himself had known Azizan earlier.

[19] After both the accused had testified, the defence closed their case. Ifound the evidence of the accused persons consistent with their cautioned statement. After their arrest no doubt both the accused must have been detained and investigated separately. Yet their cautioned statements are consistent in that they maintained they were not carrying the offending drugs at the material time but that the said drugs were actually found by the police in the bushes. In *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 FC where the defence was consistent with the cautioned statement made to the police the Federal Court acquitted the accused. On this issue this is what Edgar Joseph Jr FCJ said at p 218:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention — in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness

box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[20] Having heard the evidence of both the accused there is a doubt in my mind as to whether the exh P3A namely the white plastic bag with the drugs in it was actually being carried in between both the accused on the motorcycle. This is based upon both their cautioned statement, wherein no mention had been made that they were transporting the drugs on the motorcycle.

[21] The first accused's cautioned statement showed that he had asked the second accused to give him a lift to transport the drugs which one Rahim had given to one Azizan and that at the material time the drugs were at Jalan Pekan Darat near the 'benteng'. In other words both the accused were on their way to pick up the drugs.

[22] They met Azizan on the road and Azizan told them to go into the side road and then to exchange the drugs for cash. Azizan then left. They entered the side road and whilst waiting were arrested. Even the raiding party confirmed that the motorcycle stopped along the side road. The second accused whilst confirming the meeting with Azizan on the road, in his cautioned statement did not name Azizan but referred to him as a customer. The second accused maintained that at the material time the drugs were in the bushes.

[23] The story of both the accused is consistent with the fact that they were not transporting the drugs when they were arrested. It is easy to surmise what happened. The two accused persons were merely to act as transporters. They were to be paid (since no money was found on them upon arrest) for collecting the drugs from the hiding place in the bushes and transporting the drugs. Whilst they had just arrived at the place the police moved in, possibly too quickly. Before both the accused could collect the drugs from the bushes, the police must have apprehended them.

[24] In any case I am convinced that at the material time of arrest both the accused were not transporting the drugs. Hence I acquitted and discharged them.

Accused persons acquitted.

Reported by I Izzuddin